

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
MARK FRANCIS JAMES and)	CASE NO. 02-35561 HCD
LISA ANN JAMES,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
J. RICHARD RANSEL,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 03-3124
)	
MARK FRANCIS JAMES,)	
LISA ANN JAMES,)	
DONALD J. BERGER, and)	
ANDRE B. GAMMAGE,)	
)	
DEFENDANTS.)	

Appearances:

J. Richard Ransel, Esq., Trustee, Thorne Grodnik, LLP, 228 West High Street, Elkhart, Indiana 46516;

Jordan P. Williams, Esq., attorney for Trustee, Thorne Grodnik, LLP, 228 West High Street, Elkhart, Indiana 46516;

Mark F. James, Esq., defendant, 914 East Jefferson Boulevard, South Bend, Indiana 46617;

Donald J. Berger, Esq., defendant, Berger & Gammage, Suite 800, JMS Building, 108 North Main Street, South Bend, Indiana 46601; and

Andre B. Gammage, Esq., defendant, Berger & Gammage, Suite 800, JMS Building, 108 North Main Street, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on June 23, 2004.

Before the court is the Complaint of Trustee to Avoid Debtors' Preferential Transfer, filed on September 11, 2003, by J. Richard Ransel, Chapter 7 Trustee for the bankruptcy case of the debtors Mark Francis

James and Lisa Ann James. The Trustee claimed that the assignment by the debtor Mark James (“James” or “debtor”) to his former law partners, Donald J. Berger and Andre B. Gammage (“partners” or “creditors”), was a voidable preferential insider transfer that the Trustee could collect on behalf of the debtors’ bankruptcy estate. At the pretrial conference held December 3, 2003, the court directed the parties to file stipulated facts and briefs. Once the briefing schedule had passed, the court took the matter under advisement.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(F) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

A. Uncontested Facts

The parties have stipulated to the underlying facts. Mark James was a partner in the law firm of Berger, James & Gammage. However, in March 2002 the law partners mutually agreed to dissolve their law partnership. At that time, James had been performing legal services for an estate client, the Estate of Bredensteiner. On March 22, 2002, the parties executed the “Partnership Meeting and Agreement for Dissolution.” See R. 18, Ex. A. In that agreement, they announced that the partnership would terminate on March 24, 2002. In addition, James acknowledged his debts to the partnership and agreed to pay to his partners

the attorney fees that he would receive from that estate client.¹ Although James thought that he would be paid \$25,000 by the Estate of Bredensteiner, he actually received \$17,829. That amount was deposited in the Trustee's account pending the final determination of the disposition of those fees. The debtor stipulated that he consented to the relief sought by the Trustee.

On September 27, 2002, Mark and Lisa James filed their voluntary chapter 7 bankruptcy petition without mentioning those fees in their bankruptcy schedules. However, on their amended Schedule C, filed on December 19, 2002, they claimed a \$25,000 exemption for "attorney fees." The Trustee filed an objection to the debtors' claimed exemption. In addition, Berger and Gammage had filed a Notice of Attorney Lien in the state court case of Estate of Bredensteiner and, in this court, had claimed a perfected lien on the debtor's attorney fees. Mark James objected to the partners' claimed lien on his fees. The debtor filed a Motion to Avoid Lien, and both the Trustee and the partners filed objections to his motion.

The bankruptcy court then considered the status of the debtor's promised attorney fee payment to his two former law partners. It reviewed the Trustee's objection to the debtors' claimed exemption and James's motion to avoid the partners' claimed lien. In its Memorandum of Decision of August 25, 2003, the court first determined that the debtor's compensation for services performed on behalf of the Bredensteiner Estate before the debtor filed bankruptcy was property of the debtors' estate and that the attorney fee payment was not entitled to an exemption. It also found that the partners' Notice of Attorney Lien did not create a valid lien on the debtor's attorney fee and therefore that there was no valid attorney lien to be avoided in bankruptcy. There was

¹ The agreement specifically stated Mark James's payment commitment as follows:

Mark James has agreed to apply 100% of the attorney's fees which is in the amount of \$25,000.00 due him for legal representation in the Estate of Bredensteiner which will be applied to his total arrearage due Berger James and Gammage.

R. 18 Ex. A.

no appeal of that decision. Now before the court is the adversary proceeding initiated by the Trustee to avoid the assigned transfer of the debtor's attorney fees.

B. Position of the Parties

In his complaint and brief in support of the complaint, the Trustee contended first that there actually was no transfer of the debtor's attorney fees to the partners. He pointed out that the debtor conveyed only a promise to pay, not any property or property interest. Moreover, when the debtor received the fees post-petition, pursuant to the parties' agreement he deposited the funds with the Trustee rather than transferring them to the partners. In light of the court's decision that the fees were part of the debtors' estate and that the partners' attorney lien was invalid, the Trustee asserted that the fees should be administered by him free from the claims of the partners. In the alternative, the Trustee contended that, if a transfer of the attorney fees actually occurred, that transfer was a voidable insider preferential transfer pursuant to § 547(b)(4)(B).

The partners denied the Trustee's contentions. They explained that James owed them approximately \$50,000 and offered to pay a portion of that debt with the attorney fees to be paid to him by the Estate of Bredensteiner.² They claimed, therefore, that there was sufficient consideration for the assignment of the attorney fees to them. They concluded that, "since the allegation of an Insider Preferential Transfer is a rebuttable presumption[, . . .] [it] has been rebutted by a consideration for this assignment." R. 24 at 2.

The Trustee replied that the creditors' argument could not stand. He pointed out that it was undisputed that the transfer was made on March 22, 2002, within one year of the debtors' bankruptcy filing on September 27, 2002, and that the debtor was insolvent when he entered into the agreement with his law partners. Therefore the transfer must be classified as an "insider" preferential transfer, he claimed.

² The law partners also stated in their "Creditors/Defendant's [*sic*] Response to Trustee's Adversary Proceeding" that the debtor's assignment to them was tendered before September 27, 2001, as a partial payment for accrued and unpaid expenses owing to Berger, James, and Gammage. *See* R. 6 ¶ 13. However, they offered no proof of that factual allegation and did not raise it again in their brief.

Discussion

The Trustee claims first that the attorney fees paid to the debtor never were actually transferred to the creditors, his former law partners. The court acknowledges that the fees at issue were paid post-petition to the debtor, months after the execution of the written dissolution agreement assigning the fees to Berger and Gammage, and were never transferred to the partners. Nevertheless, the debtor does not deny that he engaged in a transfer of property in the March 22, 2002 dissolution agreement and intended to transfer ownership interest in those fees to his law partners as soon as he was paid. It is also unchallenged that the partners intended to fix a lien on the debtor's property interest in the fees. The court finds, therefore, that the parties intended a transfer at the time the dissolution agreement was signed. The issue is whether the transfer was effective.

Crucial to that consideration is the fact that the partners never fixed a lien on the attorney fees. The court found, in its Memorandum of Decision of August 25, 2003, that the creditors' Notice of Attorney Lien in state court was not a valid lien on the debtor's fees and could not be perfected. The determination of when a transfer is made depends on when it is perfected. If a transfer has not been perfected before bankruptcy is filed, the Bankruptcy Code deems the transfer, for preference analysis purposes, to have been made "immediately before the date of the filing of the petition." See § 547(e)(2)(C); see also *Sysco Foods Co., Inc. v. Eldercare Housing Found., Inc. (In re Eldercare Housing Found., Inc.)*, 205 B.R. 210, 211-12 (9th Cir. B.A.P. 1996). That transfer immediately before the petition "meets the conditions for avoidance as a preference." *Hildebrand v. Hays Imports, Inc. (In re Johnson)*, 279 B.R. 218, 221 (Bankr. M.D. Tenn. 2002). In light of the breadth of the Bankruptcy Code's definition of "transfer,"³ see *Village of San Jose v. McWilliams*, 284 F.3d 785, 793 (7th Cir. 2002); *Freedom Group, Inc. v. Lapham-Hickey Steel Corp. (In re Freedom Group, Inc.)*, 50 F.3d 408, 410 (7th

³ The Bankruptcy Code presents the following definition of "transfer":

"Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.

11 U.S.C. § 101(54).

Cir. 1995), and its explicit rule that an unperfected transfer is deemed to have been made just before the filing date, the court finds that a transfer was effected between the parties.

The court next considers whether the Trustee may avoid the transfer of attorney fees made by the debtor to his former law partners before he declared bankruptcy. It begins with § 547(b) of the Bankruptcy Code, which permits a trustee to avoid “any transfer of an interest of the debtor in property —

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made —
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if —
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The Trustee, as plaintiff, bears the burden of proving all the elements of § 547(b) by a preponderance of the evidence. *See* § 547(g); *Warsco v. Preferred Technical Group*, 258 F.3d 557, 564 (7th Cir. 2001). The creditors also are charged with “the burden of proving the nonavoidability of a transfer under subsection (c) of this section.” § 547(g); *see also In re Prescott*, 805 F.2d 719, 727 (7th Cir. 1986).

The court finds that the Trustee did succeed in meeting his burden of demonstrating that he may avoid the transfer. This showing was made easier by the fact that the partners failed to challenge any element of his burden of proof under § 547(b). *See 5 Collier on Bankruptcy* ¶ 547.13 at 547-101 (Alan N. Resnick, Henry J. Sommer, eds., 15th ed. rev’d 2003) (“If the creditor does not produce ‘some’ evidence tending to prove solvency, the trustee will prevail on the issue without more.”) (citing cases). It is clear that the debtor’s prepetition transfer of his interest in the attorney fees was made to or for the benefit of the partners on account

of an antecedent debt he owed to them. It also is uncontroverted that the transfer was made while the debtor, who owed them \$50,000, was insolvent. The court finds that the defendants, as the debtor’s former law partners, were “insiders” as that term is defined in the Bankruptcy Code. *See* § 101(31)(A)(iii).⁴ The assignment of attorney fees, which occurred approximately six months prior to the debtors’ bankruptcy filing, thus was a transfer which fell within the expanded one-year avoidance period. *See* § 547(b)(4)(B). Because it was unperfected, the transfer was “treated as if made ‘contemporaneously with bankruptcy.’” 5 *Collier on Bankruptcy* ¶ 547.09 at 547-90 (quoting *Muncie Banking Corp. v. Retherford (In re Cox)*, 132 F.2d 881, 883 (7th Cir. 1943)). After considering each element of § 547(b) in light of the record before the court, the court finds that the plaintiff Trustee met his burden of proof and that the defendants failed to rebut his proof.

The court also finds that the partners did not rely on subsection (c) to prove the nonavoidability of the transfer of the debtor’s attorney fees. Although they claimed that “the allegation of an Insider Preferential Transfer is a rebuttable presumption,” they did not show that they fall within any of the statutory exceptions listed in § 547(c). R. 24 at 2. The partners instead proffered as an affirmative defense the assertion that James’ \$50,000 obligation to the partners “was sufficient to serve as consideration for the transfer obviating any assertion that the transfer was preferential.” *Id.* The court finds that the creditors’ claim of a pre-existing obligation does not demonstrate that the March 22, 2002 transfer of attorney fees was not avoidable. Moreover, the parties offer no case law to substantiate their position. Therefore, the court determines that the partners have not met their burden of proving the nonavoidability of the attorney fee transfer.

⁴ The Bankruptcy Code defines the term “insider” as follows:

“Insider” includes —

(A) if the debtor is an individual —

...

(iii) general partner of the debtor.

11 U.S.C. § 101(31).

However, this determination is not simply a battle of the burden of proofs. The court finds that the broad goals of the Bankruptcy Code require the avoidance of this transfer by the debtor. In its prior Memorandum of Decision, it found that the debtor's attorney fees were property of the debtors' estate and were recoverable by the Trustee. The Supreme Court, in *Begier v. I.R.S.*, 496 U.S. 53, 110 S. Ct. 2258, 110 L.Ed.2d 46 (1990), emphasized that "the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate—the property available for distribution to creditors," and it gave its definition of "property of the debtor":

"[P]roperty of the debtor" subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings.

Id. at 58, 110 S. Ct. at 2263. The Bankruptcy Code promotes equality of distribution among creditors. It also allows the avoidance of payments that are regarded as preferential "because they allow the favored creditor to receive more than if he had to wait in line with other creditors and share with them what is usually rather slim pickings from the debtor's estate." *Kleven v. Household Bank F.S.B.*, 334 F.3d 638, 641 (7th Cir.), *cert. denied*, 124 S. Ct. 924 (2003).

The purpose of allowing preferential transfers to be set aside is to prevent debtors who are tottering toward bankruptcy from playing favorites among their creditors, trying to keep alive a little longer by placating the most importunate ones. . . . The statute reduces the debtor's ability to play favorites, and hence the anxiety of creditors, and hence the costly melee that such anxiety can engender, by telling the favored creditor that if the debtor goes broke within ninety days after the transfer, the transfer will be undone and the favored creditor tossed back in the pool with the rest of the creditors.

Freedom Group, Inc., 50 F.3d at 410-11. In this case, the debtor favored his former law partners over his other creditors. Accordingly, the Trustee may avoid the preferential transfer of the debtor's attorney fee to those insiders.

Conclusion

For the reasons stated above, the court finds that the Trustee J. Richard Ransel successfully bore the burden of proving all the elements of 11 U.S.C. § 547(b) by a preponderance of the evidence. The court finds that the transfer by the debtor Mark Francis James to his former law partners, defendants Donald J. Berger and Andre B. Gammage, was a voidable preferential insider transfer that the Trustee could collect on behalf of the debtors' bankruptcy estate. The court therefore grants the Complaint of Trustee to Avoid Debtors' Preferential Transfer.

SO ORDERED.

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HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT